discharge trial, found that the respondent was still a sexually violent person. He presently remains committed to a state hospital as a SVP.

Prior to the discharge trial, the petitioner filed a pretrial motion challenging the constitutionality of the statute. (App. 21-22). He maintained that the civil commitment statute violated the due process clauses of both the U.S. and Wisconsin Constitutions, as set forth in the Fifth and Fourteenth Amendments and Article I, Section 8, respectively, because it failed to require proof of a recent overt act. During the litigation of the motion the parties stipulated to the following facts:

> "Mr. Bush was convicted in 1988 of attempted second degree sexual assault, which, the state maintains, is the predicate act authorizing the filing of the original petition for a Chapter 980 commitment. Subsequent to his 1988 conviction, Mr. Bush was paroled and was permitted to leave the State of Wisconsin in 1992. He was arrested in 1992 for operating under the influence, but was acquitted of that charge. As a direct result of his arrest for the operating under the influence charge, he was returned to the State of Wisconsin to face revocation proceedings. Ultimately, he was revoked as a result of drinking related events. At no time was he charged with any new sexually violent offense after the 1988 assault. His revocation was as a consequence to non-sexually assaultive behavior. These violations did not constitute recent overt acts of sexual violence. No evidence was provided in the petition to reflect that the respondent committed any 'recent overt act,' nor was any evidence, consistent with

> a 'recent overt act,' introduced at the time of the probable cause hearing."

The due process challenge was rejected by the trial court.

The petitioner again appealed, challenging only the court's denial of his pretrial motion. The Court of Appeals affirmed the lower court's order, but declined to address the substantive constitutional issue raised. *In re the Commitment of Bush*, 2004 WI App. 193. Mr. Bush sought, and was granted, discretionary review by the Wisconsin Supreme Court. That court's decision is the subject of the instant certiorari petition. *In re the Commitment of Bush*, 2005 WI 103. The Wisconsin Supreme Court determined that due process does not prohibit an SVP commitment absent a showing that there was a recent overt act, when there has been a break in the offender's incarceration and when the offender has been reincarcerated for non-sexual behavior. (App. 15-16, ¶29; App. 20, ¶¶39-40). The court concluded that an individual can be committed as one who is dangerous, despite the absence of a recent overt act. The decision found that the ultimate basis for SVP commitment must be reliant upon the offender's "relevant character traits and patterns of behavior." (App. 17, ¶33).

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE WISCONSIN SUPREME COURT DECISION IS IN CONFLICT WITH DECISIONS OF BOTH THE HIGHEST COURT OF ANOTHER STATE AND THIS COURT.

In this case, the Wisconsin Supreme Court expressly determined, that due process does not require proof of a

recent overt act when determining dangerousness for SVP commitments. More particularly, no recent overt act need be established for those situations where there has been a break in the offender's incarceration and when the offender has been reincarcerated for non-sexual behavior. (App. 15-16, ¶29; App. 20, ¶¶39-40). The opinion effectively permits civil commitment for those who have been released into the community after serving a criminal sentence for a sexually violent act, but who have been reincarcerated for non-sexually related rule violations. This holding could arguably permit civil commitments, even if the offender had been on supervision within the community for 10, 15, or 20 years, without having committed a recent sexually violent offense.

The petitioner challenges the correctness of the opinion below because it directly conflicts with decisions of the Supreme Court of Washington. The Washington State Supreme Court in *In re the Detention of Albrecht*, 5 P.3d 73 (2002), determined that when a sex offender has been released into the community, and is later revoked and reconfined for an act that would not itself qualify as an overt act under the SVP statute, he cannot be committed as an SVP. Due process requires proof of a recent overt act as a prerequisite to SVP commitment. *Albrecht* at 78.

The respondent in *Albrecht* had been convicted of a sexual offense and was confined to prison for forty-eight months. That period was followed by community supervision. He was released in July of 1996 into the community. *Albrecht* at 74. In August of 1996, he was arrested for conduct which did not constitute a recent overt act. *Albrecht* at 75. "Recent overt act" means any act that has either caused harm of a sexually violent nature or causes a reasonable apprehension of such harm. *Former* RCW

71.09.020(5) (1995). This definition is the functional equivalent to the Wisconsin definition of sexually violent offense as described in Wis. Stats. §980.01(6). (App. 23-24).

As an alternative to full revocation of his supervision, Albrecht entered into a plea agreement with the prosecution which resulted in a 120 day jail sentence for this conduct. *Albrecht* at 75. In October of 1996, the court modified his community supervision by the imposition of a 120 day jail sentence, with credit for time served, relating back to August 20, 1996. *Albrecht* at 75. On November 7, 1996, while Albrecht was still in jail for the community placement violation, an SVP petition was filed. *Albrecht* at 75.

The trial court determined that Albrecht was in continuous custody and therefore, the state did not have to prove a recent overt act. *Albrecht* at 76. On appeal, the *Albrecht* court distinguished between the proof necessary for petitions filed for those who are serving a continuous sentence resulting from a conviction for a sexually violent offense from those who are placed on supervision and who are reincarcerated as a consequence to "non-overt act" misconduct.

The *Albrecht* court's analysis began by considering its previous holding in *In Re the Personal Restraint of Young*, 122 Wash.2d 1, 26 (1993). In *Young*, the court held that SVP commitments are predicated on dangerousness. *Young* at 32. The applicable Washington State statute in place at the time *Young* was decided, defined a sexually violent predator as one who was "likely to engage in predatory acts of sexual violence if not confined in a secure facility." *Young* upheld a due process challenge to the state SVP statute. However, it determined that:

> "Under *Harris*, proof of a recent overt act is necessary to satisfy concerns when an individual has been released into the community. 98 Wash.2d at 284, 654 P.2d 109. When an individual has been in the community, the State has the opportunity to prove dangerousness through evidence of a recent overt act. We construe statutes to render them constitutional. Therefore, we hold that the State must provide evidence of a recent overt act in accord with *Harris* whenever an individual is not incarcerated at the time the petition if filed. For non-incarcerated individuals, a sex predator petition under RCW 71.09.030 must include an allegation of a recent overt sufficient to establish probable cause when considered in conjunction with the other factors listed in RCW 71.09.040." *Young* at 41-42, citing *In re Harris*, 98 Wash.2d 276, 654 P.2d 109 (1982).

In response to the court's decision in *Young*, the Washington State legislature changed the applicable statute to the following:

> "[a] person who at any time previously has been convicted of a sexually violent offense and *has since been released from total confinement*" only where he or she has committed a recent overt act. RCW 71.09.030(5) (emphasis added). *Albrecht* at 77.

*Albrecht* reaffirmed the rationale in *Young* by noting that in the State of Washington, a person who has been convicted of a sexually violent offense in the past and who has been since released from total confinement, can be the proper subject of an SVP petition only when he or she has committed a recent overt act. *Albrecht* at 77. The dangerousness component of SVP evidence must be demonstrated

to be one which is "current." *Albrecht* at 76, citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

The *Albrecht* court, however, reaffirmed for those individuals who are continuously serving a sentence for a crime of sexual violence, a petition could be filed without proof of a recent overt act. *Albrecht* at 77. It would be illogical to require that proof be presented for one who is imprisoned for a sexually violent offense, that he again committed a recent overt act while institutionalized. The court determined that "due process 'does not require that the absurd be done before a compelling state interest can be vindicated.'" *Albrecht* at 77.

The *Albrecht* court ultimately concluded:

> "The existence of a recent overt act, as that term is defined by former RCW 71.08.020(5) (1995), necessarily satisfies the dangerousness element required by due process. This is because the recent overt act requirement directly and specifically speaks to a person's dangerousness and thus satisfies the dangerousness element required by due process." *Albrecht* at 78.
>
> "To relieve the State of the burden of proving a recent overt act because an offender is in jail for a violation of the conditions of community placement would subvert due process. An individual who has recently been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be currently dangerous." *Albrecht* at 78.

In stark contrast to the holding in *Albrecht*, the Wisconsin Supreme Court rejected the bright-line rule adopted by the Washington State Supreme Court, that the

determination of an offender's level of current dangerousness requires proof of a recent overt act when the individual has been released to community supervision. The Wisconsin court essentially concluded that the determination of an offender's current dangerousness requires an accounting of all past violations of the law, relevant character traits, and patterns of behavior, without regard to the existence of a recent overt act.

The opinion of the Wisconsin Supreme Court is inconsistent with the essence of this Court's holding in *Foucha v. Louisiana*, 504 U.S. 71 (1992), that continued confinement of an insanity acquittee was impermissible, absent proof by clear and convincing evidence of both "current mental illness and dangerousness." *Foucha* at 86.

The decisions from the State of Washington and that of this court in *Foucha*, require a finding of current dangerousness before ordering initial or continued involuntary commitment. The required finding of current dangerousness for an individual who has been released from incarceration into the community must be predicated upon a finding of a recent overt act. These decisions are clearly in stark conflict with the *Bush* holding, challenged herein.

It is self-evident that when a governmental authority has deemed it appropriate to release a sex offender into the community, a determination has been made that he does not present the requisite current dangerousness which necessitates institutionalization. As such, an SVP petition against a sex offender who has been released must require proof of a recent overt act. The granting of this petition will allow this Court to address the apparent conflict between the decision in *Foucha* and those authored by the Supreme Court of the State of Washington,

and the opinion which is the subject of the instant requested review.

## II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE WISCONSIN SUPREME COURT HAS INTERPRETED A CONSTITUTIONAL ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The issue at bar is one which is so significant that it should be settled by this Court. There are sixteen states which have, to date, implemented legislation to allow involuntary civil commitment of sexually violent persons. While there are procedural variances within the statutes, the objectives of each legislation has a common purpose, to wit: the protection of citizens by treating those who have previously committed acts of sexual violence, and whose mental condition creates a substantial risk of reoffending. That objective has been sanctioned by this Court, as well as through the decisions of numerous other state appeals courts. *Kansas v. Hendricks*, 521 U.S. 346 (1997); e.g., *State v. Post*, 197 Wis.2d 279 (1995).

In *Hendricks*, the court sustained the lawfulness of the Kansas SVP Act on double jeopardy, *ex post facto*, and due process grounds. In doing so, however, the court reiterated the necessity that the act required a finding of dangerousness. *Hendricks* at 357-358; see also *Kansas v. Crane*, 534 U.S. 407, 409-410 (2002).

The consequences of commitment, pursuant to any Sexually Violent Persons Act, is dramatic and life altering. Any respondent who has been committed in such a civil proceeding will necessarily have his or her liberty deprived for periods which may extend throughout his or her

natural life. It is reasonable to expect that the issue raised herein will be presented before the court of highest review at some juncture for all states who enacted such legislation. To date, the necessity for proof of a recent overt act as a predicate to SVP commitment, has been considered in varying contexts by other states in addition to Washington and Wisconsin.

The Iowa SVP statute has a specific requirement that there be proof of a recent overt act in order to find commitment appropriate. It provides that:

> "If a person is not confined at the time that a petition is filed, a person is 'likely to engage in predatory acts of sexual violence' only if the person commits a recent overt act." Iowa Code, §229A.2(3).

In *In re the Detention of Gonzales*, 658 N.W.2d 102 (2003), the Iowa Supreme Court was called upon to interpret this provision as it applied to *Gonzales*. The court concluded that Gonzales was not confined for a sexually violent offense at the time the petition was filed. He therefore could not be committed as an SVP. *Gonzales* at 106. The *Gonzales* court's analysis included an interpretation of previous decisions which had addressed the state statute governing commitment of mentally ill persons. The court analogized the SVP procedure to the commitment of mentally ill persons. It noted that previous holdings concluded that due process requires, for commitment of a mentally ill person, that there be proof that the subject posed a serious threat to themselves or others as evidenced by a recent overt act, attempt or threat. *Gonzales* at 105, citing *Stamus v. Leonhardt*, 414 F. Supp. 439, 451 (S.D. Iowa 1976).

Other lower appellate tribunals who have considered issues similar to that presented herein, have reached differing conclusions. In *Commonwealth v. McLeod*, 771 N.E.2d 142 (2002), the Supreme Judicial Court of Massachusetts determined that a defendant who was not serving a sentence for a sexual offense as defined by Massachusetts statutes, is not eligible for potential SVP commitment. *McLeod* at 147.

In *Beasley v. Molett*, 95 S.W.3d 599 (Tex. Ct. App. 2002), the Texas Court of Appeals rejected the respondent's due process assault on the state SVP commitment procedure because it failed to require proof of a recent overt act. *Molett* at 599. The *Molett* decision held that "the lack of recent overt acts or continuing pattern of behavior during incarceration would not indicate lack of danger, but rather the fact of incarceration." *Molett* at 599. The court did not specifically address whether proof of a recent overt act is mandated by due process for those who have been released into the community under supervision, and then reincarcerated for non-sexually related conduct.

In *In re the Matter of Linehan*, 544 N.W.2d 308 (1996), the Minnesota Court of Appeals, while not directly addressing a claimed due process violation for failure to require proof of a recent overt act, stated the following:

> "However, Minn. Stat. §235B.02, subd. 18b, contains no requirement of a recent overt act. *Cf. In re Young*, 122 Wash.2d 1, 857 P.2d 989, 1008-09 (1993) (concluding under Washington's sexually violent predators statute, that the constitution does not require evidence of a recent act to prove dangerousness when the individual is currently incarcerated." Citing *State v. Carpenter*, 197 Wis.2d 352 (1992); *Linehan* at 312.

The California Court of Appeals for the Sixth District rejected the respondent's equal protection challenge to that state's SVP law, on the grounds that there is no requirement that the state prove the existence of a recent overt act. *People v. Hubbart*, 88 Cal. App. 4th 1202, 1221 (2001). The court determined that the statute's requirement of proof of a current mental condition and current dangerousness satisfied equal protection requirements.

The Superior Court of New Jersey Appellate Division similarly found that the state SVP statute does not require proof that the respondent must have recently committed an overt act. *In the Matter of the Civil Commitment of P.Z.H.*, 873 A.2d 595, 599 (2005). The *P.Z.H.* decision did not specifically consider the need for proof of a recent overt act within the due process context.

The need to resolve the question presented is crucial because of the severe and long lasting consequences of SVP commitment proceedings. The specter of lifetime involuntary institutionalization requires that due process challenges be resolved by the highest court of the land.

## CONCLUSION

This Court should grant the petition for writ of certiorari and reverse the decision by the Wisconsin Supreme Court.

Respectfully submitted,

ROBERT G. LEBELL
*Counsel of Record for Petitioner*
735 W. Wisconsin Avenue,
Suite 800
Milwaukee, WI 53233
(414) 276-1233

699 N.W.2d 80

Supreme Court of Wisconsin.
In re the COMMITMENT OF Thomas H. BUSH:
State of Wisconsin, Petitioner-Respondent,
v.
Thomas H. Bush, Respondent-Appellant-Petitioner.
**No. 2003AP2306.**

Argued April 29, 2005.
Decided July 6, 2005.

For the respondent-appellant-petitioner there were briefs by Robert G. LeBell and Kostich, LeBell, Dobroski & Morgan, L.L.P., Milwaukee, and oral argument by Robert G. LeBell.

For the petitioner-respondent the cause was argued by Sally L. Wellman, assistant attorney general, with whom on the brief was Peggy A. Lautenschlager, attorney general.

¶ 1 LOUIS B. BUTLER, JR., J.

Thomas H. **Bush** seeks review of a published court of appeals decision that affirmed a circuit court's order denying two pretrial motions challenging the constitutionality of Wis. Stat. ch. 980 (chapter 980) (2001-02).[1] ***State*** *v.* ***Bush***, 2004 WI App 193, 276 Wis.2d 806, 688 N.W.2d 752 (***Bush III***). The court of appeals concluded that **Bush** was procedurally barred from raising a constitutional challenge against chapter 980. *Id.*, ¶ 19.

¶ 2 **Bush** asks this court to reverse the court of appeals' decision and hold that he is not procedurally barred from

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise indicated.

bringing this constitutional claim. **Bush** further asks this court to conclude that chapter 980 is facially unconstitutional on substantive due process grounds in that it does not require proof of a "recent overt act" when there has been a break in the offender's incarceration and the offender has been reincarcerated for nonsexual behavior.

¶ 3 Although the State argues that Bush has waived the issue regarding his constitutional challenge to chapter 980, we reach the issue's merits. We conclude that due process does not require a showing of a recent overt act when there is a break in the offender's incarceration and the offender is subsequently reincarcerated for nonsexual behavior in order to prove current dangerousness. We decline to adopt a bright-line rule that requires current dangerousness to be proven by a particular type of evidence. Accordingly, we affirm the decision of the court of appeals.

## I

¶ 4 The following facts are undisputed and were stipulated to by the parties at trial:

> Mr. Bush was convicted in 1988 of attempted second degree sexual assault, which, the state maintains, is the predicate act authorizing the filing of the original petition for a Chapter 980 commitment. Subsequent to his 1988 conviction, Mr. Bush was paroled and was permitted to leave the State of Wisconsin in 1992. He was arrested in 1992 for operating under the influence, but was acquitted of that charge. As a direct result of his arrest for the operating under the influence charge, he was returned to the State of Wisconsin to face revocation proceedings. Ultimately, he

> was revoked as a result of drinking related events. At no time was he charged with any new sexually violent offense after the 1988 assault. His revocation was as a consequence to non-sexually assaultive behavior. These violations did not constitute recent overt acts of sexual violence. No evidence was provided in the petition to reflect that the respondent committed any "recent overt act," nor was any evidence, consistent with a "recent overt act," introduced at the time of the probable cause hearing.

¶ 5 The following additional facts are also helpful for our analysis.[3] When Bush was arrested for attempted second-degree sexual assault in 1988, he had been placed on parole just 26 days prior for a conviction of attempted first-degree sexual assault. Prior to his 1988 conviction, Bush was convicted of numerous sex-related offenses, which include: two counts of sexual assault, three counts of sexual perversion, three counts of disorderly conduct (including a "Peeping Tom" offense), two counts of second-degree criminal sexual conduct, and two counts of attempted

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[3] As seen below, Bush has had two commitment hearings, one in 1997 and another in 2000. The current appellate record does not contain the trial transcripts from the 2000 commitment hearing. Although we do have the exhibits and a list of which exhibits were admitted at trial, we do not know if any of the exhibits were admitted for limited purposes. We will assume that they were not. Further, we do not know if any exhibits from the prior commitment hearing in 1997 were incorporated by reference during the 2000 commitment hearing. As they are part of our record here, we will assume that they were. *See State v. McAttee*, 2001 WI App 262, ¶ 5 n. 1, 248 Wis.2d 865, 637 N.W.2d 774 ("It is the appellant's responsibility to ensure completion of the appellate record and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court's ruling." (citation and quotations omitted)).

sexual assault. By 1988, Bush had been incarcerated or under probation and parole community supervision almost continuously in Illinois, Michigan, Minnesota, and Wisconsin since his first conviction in 1966. Aside from these convictions, Bush admitted committing other deviant sexual behavior than that for which he had been arrested.

¶ 6 In 1992, while serving the sentence for his 1988 conviction, Bush completed the Oshkosh Sex Offender Treatment Program. He was placed on parole to attend the Behavioral Medicine Institute of Atlanta, Georgia. He successfully completed the inpatient component of the Georgia program, but failed to comply with the requirements of the outpatient program, in violation of the conditions of his parole, by purchasing a sports car without knowledge or permission of the program, drinking alcohol, and getting in a car accident.[3] His parole was revoked and he was incarcerated again in Wisconsin.

¶ 7 In addition to **Bush's** prior convictions, since at least 1978, **Bush's** psychiatric evaluations have expressed the opinion that **Bush** is among those sexual offenders who are the least likely to change their behavior. More recent evaluations conducted in 1996 and 1997 recommended that **Bush** be closely supervised and identified **Bush** as posing a high risk of recidivism, despite his extensive participation in sex-offender treatment. Furthermore, while incarcerated, **Bush** continued to demonstrate behavior that is predictive of the likelihood that he will

[3] Although driving while intoxicated does not necessarily raise concerns for sexually violent behavior, drinking and driving are a particularly dangerous combination for **Bush**. The record demonstrates that "Mr. **Bush** has specific triggers regarding his sex offender criminal activity which includes alcohol and fast cars."

reoffend. For example, **Bush** was reprimanded in 1995 for attempting to purchase pornography and for corresponding by mail with a person who was engaged in "grooming a boy for sexual purposes."

¶ 8 In 1997, while **Bush** remained incarcerated for his 1988 offense, the **State** filed a chapter 980 petition,[4] alleging that **Bush** was still sexually violent. See ***Bush III***, 276 Wis.2d 806, ¶ 3, 688 N.W.2d 752; *see also* ***State v. Bush***, No. 1997AP3454, unpublished slip op. (Wis.Ct.App.

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[4] Wisconsin Stat. § 980.02(2) outlines the procedures for filing a petition alleging an offender is a sexually violent person as follows:

> (2) A petition filed under this section shall allege that all of the following apply to the person alleged to be a sexually violent person:
>
> (a) The person satisfies any of the following criteria:
>
> 1. The person has been convicted of a sexually violent offense.
>
> 2. The person has been found delinquent for a sexually violent offense.
>
> 3. The person has been found not guilty of a sexually violent offense by reason of mental disease or defect.
>
> (ag) The person is within 90 days of discharge or release, on parole, extended supervision or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense, from a secured correctional facility, as defined in s. 938.02(15m), from a secured child caring institution, as defined in s. 938.02(15g), or from a secured group home, as defined in s. 938.02(15p), if the person was placed in the facility for being adjudicated delinquent under s. 938.183 or 938.34 on the basis of a sexually violent offense or from a commitment order that was entered as a result of a sexually violent offense.
>
> (b) The person has a mental disorder.
>
> (c) The person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence.

Dec. 22, 1998) (***Bush I***). Following the trial on that petition, the jury found that **Bush** was sexually violent. *See* ***Bush III***, 276 Wis.2d 806, ¶ 3, 688 N.W.2d 752. **Bush** appealed and the court of appeals reversed his commitment because of a prejudicial jury instruction. *Id.*

¶ 9 In 2000, **Bush** was retried and a second jury came to the same conclusion. *Id.*, ¶ 4. **Bush** again appealed, arguing that: (1) the **State's** expert witnesses should have been disqualified; (2) the **State** failed to present sufficient evidence to meet chapter 980's requirements; and (3) the **State** failed to file the petition within the requisite 90 days. ***State v. Bush***, No.2001AP588, unpublished slip op. at ¶ 1 (Wis.Ct.App. Nov. 26, 2002) (***Bush II***). The court of appeals affirmed in all respects except whether the **State** had filed the chapter 980 petition in a timely manner. *See* ***Bush III***, 276 Wis.2d 806, ¶ 4, 688 N.W.2d 752. On remand, the trial court determined that the **State** had complied with the filing requirements of chapter 980. *Id.*, ¶ 4.

¶ 10 In August 2002, **Bush** filed a petition for release under Wis. Stat. § 980.09(2).[5] ***Bush III***, 276 Wis.2d 806,

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[5] Wisconsin Stat. § 980.09(2) reads as follows:

(a) A person may petition the committing court for discharge from custody or supervision without the secretary's approval. At the time of an examination under s. 980.07(1), the secretary shall provide the committed person with a written notice of the person's right to petition the court for discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the report of the department's examination under s. 980.07. If the person does not affirmatively waive the right to petition, the court shall set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the person is

(Continued on following page)

¶ 5, 688 N.W.2d 752. In the pretrial motions, **Bush** argued, in pertinent part, that he had been denied due process because chapter 980 failed to require proof of a recent overt act. *Id.* The circuit court for Eau Claire County, Honorable William M. Gabler, denied **Bush's** pretrial motions, and a jury determined that **Bush** was still sexually violent. *Id.*, ¶ 6. His petition for discharge was therefore denied. *Id.*

¶ 11 **Bush** again appealed, renewing his argument he made for the first time in the circuit court that chapter 980 is unconstitutional because it does not require a recent

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still a sexually violent person. The committed person has a right to have an attorney represent him or her at the probable cause hearing, but the person is not entitled to be present at the probable cause hearing.

(b) If the court determines at the probable cause hearing under par. (a) that probable cause exists to believe that the committed person is no longer a sexually violent person, then the court shall set a hearing on the issue. At a hearing under this paragraph, the committed person is entitled to be present and to the benefit of the protections afforded to the person under s. 980.03. The district attorney or the department of justice, whichever filed the original petition, shall represent the state at a hearing under this paragraph. The hearing under this paragraph shall be to the court. The state has the right to have the committed person evaluated by experts chosen by the state. At the hearing, the state has the burden of proving by clear and convincing evidence that the committed person is still a sexually violent person.

(c) If the court is satisfied that the state has not met its burden of proof under par. (b), the person shall be discharged from the custody or supervision of the department. If the court is satisfied that the state has met its burden of proof under par. (b), the court may proceed to determine, using the criteria specified in s. 980.08(4)(b), whether to modify the person's existing commitment order by authorizing supervised release.

overt act. The State argued that **Bush** should not be allowed to attack the underlying commitment on constitutional grounds because he should have made this challenge in his two prior appeals. *Id.*, ¶ 7. The court of appeals agreed with the State and concluded that **Bush** was procedurally barred from raising the issue of the constitutionality of chapter 980. *Id.*, ¶¶ 8, 19.

¶ 12 **Bush** seeks review, and we affirm.

II

¶ 13 **Bush** challenges the constitutionality of chapter 980 on due process grounds, alleging that the statute fails to require a finding of a recent overt act. The constitutionality of a statute is a question of law which we review de novo. *State v. Randall,* 192 Wis.2d 800, 824, 532 N.W.2d 94 (1995). This court has already determined that the State has dual interests under the statute to protect the public from the dangerously mentally disordered and to provide care and treatment to those with mental disorders that predispose them to sexual violence. *State v. Post,* 197 Wis.2d 279, 302, 541 N.W.2d 115 (1995). The Supreme Court has recognized both of these interests as legitimate, the first under a state's police powers and the latter under its *parens patriae* powers. *Id.* (citing *Addington v. Texas,* 441 U.S. 418, 426, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)). Thus, the issue is whether chapter 980 is narrowly tailored under the circumstances in this case to serve these compelling state interests. *Id.*

III

¶ 14 Before addressing the merits of **Bush's** argument, we first address a procedural issue. Relying on *State v.*

*Trochinski*, 2002 WI 56, 253 Wis.2d 38, 644 N.W.2d 891, *State v. Molitor*, 210 Wis.2d 415, 565 N.W.2d 248 (Ct.App.1997), and *State ex rel. Skinkis v. Treffert*, 90 Wis.2d 528, 280 N.W.2d 316 (Ct.App.1979), **Bush** asserts that facial challenges to the constitutionality of a statute present issues of subject matter jurisdiction which cannot be waived, notwithstanding his failure to raise that challenge in his earlier appeals.

¶ 15 The State, on the other hand, argues that the law in this area lacks clarity and is inconsistent. While the State recognizes the validity of those cases relied upon by **Bush**, it nevertheless suggests that those cases have not always been followed.[6] Moreover, the State argues that another line of cases, culminating in this court's decision last term in *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 2, 30, 273 Wis.2d 76, 681 N.W.2d 190, suggest that pursuant to Article VII, Section 8 of the Wisconsin Constitution,[7] "no circuit court is without subject matter jurisdiction to

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[6] *See State v. Wilks*, 121 Wis.2d 93, 107, 358 N.W.2d 273 (1984) (where court declined to address defendant's claim that loitering ordinance was unconstitutionally vague when raised for first time on appeal); *In re Baby Girl K.*, 113 Wis.2d 429, 448, 335 N.W.2d 846 (1983) (where court considered facial constitutional challenge raised for first time on appeal as discretionary but to be done if in best interests of justice); and *Sambs v. City of Brookfield*, 66 Wis.2d 296, 314, 224 N.W.2d 582 (1975) (court declined to reach claim presented for first time on appeal that liability limits are unconstitutional, although it is not clear whether that challenge was facial or as applied). *See also State v. Thomas*, 128 Wis.2d 93, 97-101, 381 N.W.2d 567 (Ct.App.1985) (facial challenges that a statute is unconstitutionally vague go to subject matter jurisdiction).

[7] Under the Wisconsin Constitution, "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state. . . ." Wis. Const. art. VII, § 8.

entertain actions of any nature whatsoever." *Mikrut*, 273 Wis.2d 76, ¶ 8, 681 N.W.2d 190; *see Mueller v. Brunn*, 105 Wis.2d 171, 175, 313 N.W.2d 790 (1982); *Eberhardy v. Cir. Ct. for Wood Co.*, 102 Wis.2d 539, 307 N.W.2d 881 (1981).

¶ 16 We agree with the State that the jurisprudence concerning subject matter jurisdiction and a circuit court's competence to exercise its subject matter jurisdiction is murky at best. Nevertheless, we have recently resolved this area as **Bush** suggests, and we reaffirm those decisions here.

¶ 17 In both *State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis.2d 520, 665 N.W.2d 328, and *Trochinski*, 253 Wis.2d 38, ¶ 34 n. 15, 644 N.W.2d 891, this court concluded that while an "as applied" challenge to the constitutionality of a statute may be waived, a facial challenge is a matter of subject matter jurisdiction and cannot be waived. The logic behind this conclusion is entirely consistent with Article VII, Section 8 of the Wisconsin Constitution. Article VII, Section 8 states that "[e]xcept as otherwise provided by law," circuit courts have original jurisdiction "in all matters civil and criminal." If a statute is unconstitutional on its face, any action premised upon that statute fails to present any civil or criminal matter in the first instance. As the court of appeals correctly noted in *Skinkis*, if the facial attack on the statute were correct, the statute would be null and void, and the court would be without the power to act under the statute. *Skinkis*, 90 Wis.2d at 538, 280 N.W.2d 316. This is contrasted from an "as applied" challenge, where the court initially has jurisdiction over the subject matter, as the statute is valid upon its face.

¶ 18 This rule is also entirely consistent with our line of cases that recognize that a criminal complaint which fails

to allege any offense known at law is jurisdictionally defective and void. *See Champlain v. State,* 53 Wis.2d 751, 754, 193 N.W.2d 868 (1972); *State v. Lampe,* 26 Wis.2d 646, 648, 133 N.W.2d 349 (1965). Once again, the premise behind the rule is simple. Circuit courts have original jurisdiction over all matters civil and criminal, except as otherwise provided by law. If a complaint fails to state an offense known at law, no matter civil or criminal is before the court, resulting in the court being without jurisdiction in the first instance.

¶ 19 We conclude that because Bush has facially challenged the constitutionality of chapter 980, his challenge goes to the subject matter jurisdiction of the court. Therefore, because challenges to subject matter jurisdiction cannot be waived, we reach the merits of his claim.[8]

IV

¶ 20 We now consider the substance of Bush's argument. Chapter 980 applies only if an offender is a "sexually violent person." Wisconsin Stat. § 980.01(7) defines a sexually violent person as follows:

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[8] Common law principles of waiver generally apply to Bush's "as applied" constitutional challenge. *See State v. Erickson,* 227 Wis.2d 758, 766, 596 N.W.2d 749 (1999) (noting that the waiver rule exists to promote efficiency and fairness); *see also State v. Cole,* 2003 WI 112, ¶ 46, 264 Wis.2d 520, 665 N.W.2d 328, and *State v. Trochinski,* 2002 WI 56, ¶ 34 n. 15, 253 Wis.2d 38, 644 N.W.2d 891. Because Bush failed to raise this issue in his earlier appeals, and because we do not have all components of the record, we conclude that Bush has waived his *as applied* challenge. However, we decline to reach the question of whether a procedural bar, similar to one announced in *State v. Escalona-Naranjo,* 185 Wis.2d 168, 517 N.W.2d 157 (1994), applies.

> "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is *dangerous* because he or she suffers from a mental disorder that makes it likely that the person will engage in acts of sexual violence. (Emphasis added.)

¶ 21 Bush argues that Wis. Stat. chapter 980 is facially unconstitutional because it does not require a showing of a recent overt act to prove that an offender is currently dangerous. Specifically, Bush contends that chapter 980 violates due process because it fails to require a showing of a recent overt act to prove current dangerousness when there has been a break in the offender's incarceration and the offender has been reincarcerated for nonsexual behavior.

¶ 22 Bush asks this court to adopt the rationale used by the Washington Supreme Court in *In re Albrecht,* 147 Wash.2d 1, 51 P.3d 73 (2002). In that case, the Washington Supreme Court concluded that when an offender has been released into the community and his or her release is revoked for a nonsexually violent act, due process requires that the state show a recent overt act by the offender.[9] *Albrecht,* 51 P.3d at 78; *see also In re Young,* 122 Wash.2d

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[9] According to the Washington court, a "recent overt act" is "any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm." *In re Albrecht,* 147 Wash.2d 1, 51 P.3d 73, 77 (2002). When the individual has been continuously incarcerated, no evidence of a recent overt act is required because that would create an impossible standard. *Id.* at 77.

1, 857 P.2d 989, 1009 (1993).[10] The Washington Supreme Court reasoned that the constitutionality of an involuntary civil commitment is predicated on proof that the offender is dangerous and that his or her dangerousness is current. *Albrecht*, 51 P.3d at 76 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992)). Once an offender has been released into the community and is later incarcerated for a nonsexually violent offense, the offender "cannot necessarily be said to be currently dangerous." *Id.* at 78. Therefore, when an offender has been released into the community, due process is violated if the state has not demonstrated that the offender is currently dangerous, and the offender's current dangerousness must be demonstrated by a recent overt act. *Id.* at 76 (citing *Young*, 857 P.2d at 1008-09). The Washington court stated: "The existence of a recent overt act . . . necessarily satisfies the dangerousness element required by due process [because] the recent overt act requirement directly and specifically speaks to a person's dangerousness." *Id.* at 78.

¶ 23 We decline to adopt *Albrecht*. Bush's argument, rooted in the *Albrecht* rationale, raises three problems. First, Bush's entire due process argument assumes that the mere fact that an offender has been granted parole constitutes a determination that the offender is no longer

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[10] In *In re Young*, 122 Wash.2d 1, 857 P.2d 989, 1009 (1993), the Washington Supreme Court held that when an offender has been released from confinement since his or her last sex offense, but before sexually violent predator proceedings are initiated against him or her, the state had to prove he or she committed a recent overt act in order to establish dangerousness. The Washington Legislature amended its sexual predator commitment statute to reflect the court's decision. *State v. Ward*, 125 Wash.App. 374, 104 P.3d 751, 753 (2005).

dangerous. Second, Bush asks this court to adopt an absolute, bright-line rule that specifies the particular evidence that will adequately show current dangerousness, limiting the factfinder's ability to determine the offender's current level of dangerousness. Third, Bush advocates an illogical standard by urging that this court require proof of a "recent overt act" while defining "recent" as the period of time when the offender is in the community, regardless of the passage of time between the parole revocation and the filing of the involuntary civil commitment petition. We discuss each issue in turn.

A

¶ 24 At the outset, **Bush's** entire argument rests on the assumption that the parole board must have determined that **Bush** was no longer dangerous when it granted him parole in 1992. **Bush** asserts that the parole board would not have released him into the community on supervised parole if the board believed he was dangerous. Once the **State** presumably determined that **Bush** was no longer dangerous and released him into the community, **Bush** reasons, due process requires the **State** prove he had become dangerous subsequent to his release by showing a recent overt act.

¶ 25 The **State** contends that this rationale is unpersuasive because nothing in the record demonstrates why **Bush** was released on supervised parole.

¶ 26 As both parties correctly observe, the record is terse as to why **Bush** was paroled or on what basis that decision was made. In fact, the evidence contained in the record could lead to contradictory conclusions as to the parole board's rationale. On one hand, the record indicates that

prior to his 1992 parole, Bush had made "excellent" progress with his sex-offender treatment, had become a "low risk to society," and was "not dangerous to others." This evidence may have led to the conclusion that Bush was no longer dangerous.

¶ 27 On the other hand, Bush was allowed to leave prison on supervised release in order to attend the Behavioral Medicine Institute of Atlanta, Georgia. According to the record, the Atlanta program is an advanced sex-offender treatment program that "treats the most chronic of cases and those that have proven unresponsive to previous treatments." In addition, the State imposed specific conditions of release upon Bush. As such, evidence in the record also supports a determination that Bush remained dangerous.

¶ 28 Therefore, we cannot conclude that the mere fact that the State granted Bush parole necessarily leads to the conclusion that he was no longer dangerous as that concept is used in chapter 980. The record is simply too barren for us to agree with that conclusion. Although the fact that the State placed Bush on supervised parole has probative value in undercutting the State's case, it is not a conclusive determination of Bush's dangerousness under chapter 980.

B

¶ 29 Bush advocates that we adopt a bright-line rule that requires a showing that he committed a recent overt act while on parole, regardless of any of his sexually violent behavior before, or after, the period of time he was on supervised parole in 1992. We agree with the State that

due process does not require adoption of this bright-line rule.

¶ 30 We recognize that substantive as well as procedural limitations on a state's power to commit the dangerously mentally ill vary from jurisdiction to jurisdiction. *Post,* 197 Wis.2d at 312, 541 N.W.2d 115 (citing *Jackson v. Indiana,* 406 U.S. 715, 736-37, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972)). As such, the United States Supreme Court has refused to proscribe strict boundaries for legislative determinations of what is necessary for voluntary commitment. *Id.*

¶ 31 Moreover, the Court has cautioned that "an absolutist approach is unworkable" in a civil commitment analysis. *Kansas v. Crane,* 534 U.S. 407, 411, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). The Court concluded that "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules." *Crane,* 534 U.S. at 413, 122 S.Ct. 867 (citing *Kansas v. Hendricks,* 521 U.S. 346, 359, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). Bright-line rules present unworkable standards because their rigidity hampers the factfinder's ability to measure an individual's dangerousness. *See State v. Laxton,* 2002 WI 82, ¶ 21, 254 Wis.2d 185, 647 N.W.2d 784.

¶ 32 Along similar lines, inhibiting a factfinder's evaluation of dangerousness through bright-line rules is problematic because chapter 980 is reserved for only the most dangerous offenders. *See Post,* 197 Wis.2d at 307, 541 N.W.2d 115. Prior to commitment, chapter 980 requires the State to present evidence sufficient to allow the factfinder to distinguish "a dangerous sexual offender who has serious difficulty controlling his or her behavior from a

dangerous but typical recidivist." *Laxton*, 245 Wis.2d 185, ¶ 23, 647 N.W.2d 784. This evaluation is not an exact science; the standard "risk assessment" used by expert witnesses for sexual offenders "takes into account all past violations of the law in attempting to evaluate the probability of future sexually assaultive behavior." *State v. Franklin*, 2004 WI 38, ¶ 22, 270 Wis.2d 271, 677 N.W.2d 276.

¶ 33 Predicting an offender's dangerousness under chapter 980 is a complex evaluation. At trial, the factfinder is obligated to examine the totality of the offender's past actions and make a determination based on the offender's "relevant character traits and patterns of behavior," as to whether the offender's mental condition currently predisposes him or her to commit another sexually violent act. *Id.*, ¶ 14 (holding that Wis. Stat. § 904.04(2) did not apply to chapter 980); *State v. Kienitz*, 227 Wis.2d 423, 441, 597 N.W.2d 712 (1999) (reasoning that the factfinder has an obligation to weigh all the evidence presented). Ultimately, the question "is simply whether it is substantially probable that the person will engage in acts of sexual violence without regard to any specific restrictions, supervision or time frame." *See State v. Thiel*, 2004 WI App 140, ¶ 17, 275 Wis.2d 421, 685 N.W.2d 890. Thus, we agree with the State that due process does not require that an evaluation of dangerousness be limited based on Bush's proposed bright-line rule.

C

¶ 34 Finally, we agree with the State that Bush advocates an illogical application of requiring recent overt acts to prove current dangerousness. Bush defines recent overt

acts as including acts during the time he was on parole, which in this case was five years before the State filed the initial petition. His rationale is again based on *Albrecht*, where the Washington court found that to determine the offender's level of current dangerousness, the factfinder must rely on an offender's behavior when he or she is not incarcerated. *Albrecht*, 51 P.3d at 77. When an individual is continuously incarcerated, the only behavior available to the factfinder is his or her behavior prior to incarceration. *Id.* But, under *Albrecht*, when the offender has been released back into the community, his or her behavior upon release is demonstrative of whether the offender continues to be dangerous. *Id.*

¶ 35 Looking to **Bush's** time on parole, without more, does not necessarily give the factfinder an adequate evaluation of **Bush's** current dangerousness for at least three reasons.

¶ 36 First, **Bush's** parole was not close in time to his chapter 980 trial. **Bush** was released into the community under supervised parole in early 1992. In less than a month, he violated specific conditions of his parole and was reincarcerated for his 1988 offense. Five years later, the **State** filed a petition to commit **Bush** under chapter 980. **Bush** asks this court to conclude that his behavior while on parole in 1992 should be the only reliable evidence for the factfinder to use in determining whether he was currently dangerous in 1997. His conduct during his parole merely establishes that he had difficulty in conforming his behavior to the law during his short release period.

¶ 37 Second, under Bush's approach, an offender's behavior while incarcerated would be irrelevant to support

a determination of current dangerousness. However, the factfinder's analysis of an offender's current dangerousness is not limited to the offender's actions prior to his or her most recent incarceration and can include an offender's actions while incarcerated. *See Franklin*, 270 Wis.2d 271, ¶ 22, 677 N.W.2d 276; *State v. Zanelli*, 212 Wis.2d 358, 379-80, 569 N.W.2d 301 (Ct.App.1997). Here, Bush has engaged in the following behavior while incarcerated: he was reprimanded for corresponding with a person who was "grooming a boy for sexual purposes," and he attempted to obtain pornographic materials. This behavior may bear on Bush's dangerousness, but the weight to be given to this behavior is for the factfinder.

¶ 38 Third, the sexually violent offense for which Bush is incarcerated may be relevant evidence of current dangerousness. Bush was eligible for a chapter 980 commitment only because he had been convicted of a sex-related crime. The fact that Bush was incarcerated for attempted sexual assault when the chapter 980 petition was filed is evidence of his dangerousness at that time. Although this conviction, on its face, "is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder [as required for a chapter 980 commitment]," Wis. Stat. § 980.05(4),[11] we conclude that evidence of Bush's 1988 conviction is a proper component of the evaluation of his current dangerousness.

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[11] *See Kansas v. Crane*, 534 U.S. 407, 412, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (emphasizing the constitutional importance of the distinction between those who are dangerous sexual offenders and those more properly dealt with exclusively through criminal law. "That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence' – functions properly those of criminal law, not civil commitment.").

¶ 39 Therefore, we conclude that due process does not require a showing of a recent overt act to prove current dangerousness when there has been a break in the offender's incarceration and the offender has been reincarcerated for nonsexual behavior. Because due process does not require this showing under these circumstances, we agree with the State that chapter 980 is accordingly narrowly tailored to serve a compelling state interest for purposes of Bush's challenge. Therefore, we reject Bush's argument that chapter 980 is facially unconstitutional on that basis.

V

¶ 40 In sum, we conclude that chapter 980 is not facially unconstitutional. We conclude that due process does not require proof of a recent overt act in evaluating the dangerousness of the offender when there has been a break in the offender's incarceration and the offender is reincarcerated for nonsexual behavior. Substantive due process allows for a chapter 980 commitment when there is sufficient evidence of current dangerousness. We decline to adopt any bright-line rule that requires current dangerousness to be proven by a particular type of evidence.

The decision of the court of appeals is affirmed.

| STATE OF WISCONSIN | CIRCUIT COURT | EAU CLAIRE COUNTY |
|---|---|---|

**STATE OF WISCONSIN,** **Case No. 97 CI 1**

Petitioner,

vs.

**THOMAS H. BUSH,**

Respondent.

**MOTION TO DISMISS – ABSENCE OF RECENT OVERT ACT**

**COMES NOW** the above named respondent and moves the court to dismiss the above entitled action.

**AS GROUNDS THEREFORE** the respondent states that Chapter 980 of the Wisconsin Statutes is unconstitutional on its face and as applied to the respondent because it fails to require proof of a recent overt act. Such failure denies the respondent's due process of law as guaranteed by the Fifth and Fourteenth Amendment to the U.S. Constitutions and Article I, Section 8 of the Wisconsin Constitution.

**AS FURTHER GROUNDS THEREFORE** the respondent states that the petition in the instant action is insufficient in that it fails to establish that the respondent committed a recent overt act prior to the filing of the petition.

**AS FURTHER GROUNDS THEREFORE** the respondent states that the testimony at the probable cause hearing failed to establish sufficient evidence to reasonably believe that the respondent is a sexually violent person

because there was no evidence of any recent overt act prior the filing of the petition.

**AS FURTHER GROUNDS THEREFORE** the respondent relies on the attached memorandum.

Dated at Milwaukee, Wisconsin this 20th day of February, 2003.

Respectfully submitted,

/s/ Robert G. LeBell

Robert G. LeBell,
SBN 01( 15710
Attorney for Respondent
735 W. Wisconsin Avenue, #800
Milwaukee, WI 53233
(414) 276-1233

**Wis. Stat. § 980**

**Wisconsin Statute**

**CHAPTER 980**

**SEXUALLY VIOLENT PERSON COMMITMENTS**

**980.01 Definitions.** In this chapter:

**(1)** "Department" means the department of health and family services.

**(1m)** "Likely" means more likely than not.

**(2)** "Mental disorder" means a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.

**(4)** "Secretary" means the secretary of health and family services.

**(4m)** "Serious child sex offender" means a person who has been convicted, adjudicated delinquent or found not guilty or not responsible by reason of insanity or mental disease, defect or illness for committing a violation of a crime specified in s. 948.02(1) or (2) or 948.025(1) against a child who had not attained the age of 13 years.

**(5)** "Sexually motivated" means that one of the purposes for an act is for the actor's sexual arousal or gratification.

**(6)** "Sexually violent offense" means any of the following:

(a) Any crime specified in s. 940.225(1) or (2), 948.02(1) or (2), 948.025, 948.06 or 948.07.

(b) Any crime specified in s. 940.01, 940.02, 940.05, 940.06, 940.19(4) or (5), 940.195(4) or (5), 940.30, 940.305, 940.31 or 943.10 that is determined, in a proceeding under s. 980.05(3)(b), to have been sexually motivated.

(c) Any solicitation, conspiracy or attempt to commit a crime under par. (a) or (b).

(7) "Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in acts of sexual violence.

**History:** 1993 a. 479; 1995 a. 27 s. 9126(19); 1997 a. 284, 295; 2003 a. 187.

Chapter 980 creates a civil commitment procedure primarily intended to provide treatment and protect the public, not to punish the offender. As such the chapter does not provide for "punishment" in violation of the constitutional prohibitions against double jeopardy or ex post facto laws. State v. Carpenter, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).

Chapter 980 does not violate substantive due process guarantees. The definitions of "mental disorder" and "dangerous" are not overbroad. The treatment obligations under ch. 980 are consistent with the nature and duration of commitments under the chapter. The lack of a precommitment finding of treatability is not offensive to due

process requirements. State v. Post, 197 Wis. 2d 279, 541 N.W.2d 115 (1995).

Chapter 980 does not violate equal protection guarantees. The state's compelling interest in protecting the public justifies the differential treatment of the sexually violent persons subject to the chapter. State v. Post, 197 Wis. 2d 279, 541 N.W.2d 115 (1995).

A child enticement conviction under a statute that had been repealed and recreated under a new statute number was a sexually violent offense under sub. (6), although the former number was not listed in the new statute. State v. Irish, 210 Wis. 2d 107, 565 N.W.2d 161 (Ct. App. 1997).

Under sub. (7), a "mental disorder that makes it substantially probable that the person will engage in acts of sexual violence" is a disorder that predisposes the affected person to sexual violence. A person diagnosed with "antisocial personality disorder" coupled with another disorder may be found to be sexually violent. State v. Adams, 223 Wis. 2d 60, 588 N.W.2d 336 (Ct. App. 1998).

Definitions in ch. 980 serve a legal, and not medical, function. The court will not adopt a definition of pedophilia for ch. 980 purposes. State v. Zanelli, 223 Wis. 2d 545, 589 N.W.2d 687 (Ct. App. 1998).

That the state's expert's opined that pedophilia is a lifelong disorder did not mean that commitment was based solely on prior bad acts rather than a present condition. Jury instructions are discussed. State v. Matek, 223 Wis. 2d 611, 589 N.W.2d 441 (Ct. App. 1998).

As used in this chapter, "substantial probability" and "substantially probable" both mean much more likely than not. This standard for dangerousness does not violate

equal protection nor is the term unconstitutionally vague. State v. Curiel, 227 Wis. 2d 389, 597 N.W.2d 697 (1999).

The definition of "sexually violent person" includes conduct prohibited by a previous version of a statute enumerated in sub. (6) as long as the conduct prohibited under the predecessor statute remains prohibited under the current statute. State v. Pharm, 2000 WI App 167, 238 Wis. 2d 97, 617 N.W.2d 163.

The Kansas Sexually Violent Predator Act comports with due process requirements, does not run afoul of double jeopardy principles, and is not an *ex post facto* law. Kansas v. Hendricks, 521 U.S. 346, 138 L. Ed. 2d 501 (1997).

The constitutionality of Wisconsin's Sexual Predator Law. Straub & Kachelski. Wis. Law. July, 1995.

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**980.015 Notice to the department of justice and district attorney.** (1) In this section, "agency with jurisdiction" means the agency with the authority or duty to release or discharge the person.

(2) If an agency with jurisdiction has control or custody over a person who may meet the criteria for commitment as a sexually violent person, the agency with jurisdiction shall inform each appropriate district attorney and the department of justice regarding the person as soon as possible beginning 3 months prior to the applicable date of the following:

(a) The anticipated discharge from a sentence, anticipated release on parole or extended supervision or

anticipated release from imprisonment of a person who has been convicted of a sexually violent offense.

(b) The anticipated release from a secured correctional facility, as defined in s. 938.02(15m), or a secured child caring institution, as defined in s. 938.02(15g), or a secured group home, as defined in s. 938.02(15p), of a person adjudicated delinquent under s. 938.183 or 938.34 on the basis of a sexually violent offense.

(c) The termination or discharge of a person who has been found not guilty of a sexually violent offense by reason of mental disease or defect under s. 971.17.

**(3)** The agency with jurisdiction shall provide the district attorney and department of justice with all of the following:

(a) The person's name, identifying factors, anticipated future residence and offense history.

(b) If applicable, documentation of any treatment and the person's adjustment to any institutional placement.

**(4)** Any agency or officer, employee or agent of an agency is immune from criminal or civil liability for any acts or omissions as the result of a good faith effort to comply with this section.

**History:** 1993 a. 479; 1995 a. 77; 1997 a. 205, 283; 1999 a. 9. The "appropriate district attorney" under sub. (2) is the district attorney in the county of conviction or the county to which prison officials propose to release the person. In re Commitment of Goodson, 199 Wis. 2d 426, 544 N.W.2d 611 (Ct. App. 1996).

**980.02 Sexually violent person petition; contents; filing.** (1) A petition alleging that a person is a sexually violent person may be filed by one of the following:

(a) The department of justice at the request of the agency with jurisdiction, as defined in s. 980.015(1), over the person. If the department of justice decides to file a petition under this paragraph, it shall file the petition before the date of the release or discharge of the person.

(b) If the department of justice does not file a petition under par. (a), the district attorney for one of the following:

1. The county in which the person was convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense or found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness.

2. The county in which the person will reside or be placed upon his or her discharge from a sentence, release on parole or extended supervision, or release from imprisonment, from a secured correctional facility, as defined in s. 938.02(15m), from a secured child caring institution, as defined in s. 938.02(15g), from a secured group home, as defined in s. 938.02(15p), or from a commitment order.

(2) A petition filed under this section shall allege that all of the following apply to the person alleged to be a sexually violent person:

(a) The person satisfies any of the following criteria:

1. The person has been convicted of a sexually violent offense.

2. The person has been found delinquent for a sexually violent offense.

3. The person has been found not guilty of a sexually violent offense by reason of mental disease or defect.

(ag) The person is within 90 days of discharge or release, on parole, extended supervision or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense, from a secured correctional facility, as defined in s. 938.02(15m), from a secured child caring institution, as defined in s. 938.02(15g), or from a secured group home, as defined in s. 938.02(15p), if the person was placed in the facility for being adjudicated delinquent under s. 938.183 or 938.34 on the basis of a sexually violent offense or from a commitment order that was entered as a result of a sexually violent offense.

(b) The person has a mental disorder.

(c) The person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence.

(3) A petition filed under this section shall state with particularity essential facts to establish probable cause to believe the person is a sexually violent person. If the petition alleges that a sexually violent offense or act that is a basis for the allegation under sub. (2)(a) was an act that was sexually motivated as provided under s. 980.01(6)(b), the petition shall state the grounds on which the offense or act is alleged to be sexually motivated.

(4) A petition under this section shall be filed in any of the following:

(a) The circuit court for the county in which the person was convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense or found not guilty of a sexually violent offense by reason of mental disease or defect.

(am) The circuit court for the county in which the person will reside or be placed upon his or her discharge from a sentence, release on parole or extended supervision or release from imprisonment, from a secured correctional facility, as defined in s. 938.02(15m), from a secured child caring institution, as defined in s. 938.02(15g), from a secured group home, as defined in s. 938.02(15p), or from a commitment order.

(b) The circuit court for the county in which the person is in custody under a sentence, a placement to a secured correctional facility, as defined in s. 938.02(15m), a secured child caring institution, as defined in s. 938.02(15g), or a secured group home, as defined in s. 938.02(15p), or a commitment order.

(5) Notwithstanding sub. (4), if the department of justice decides to file a petition under sub. (1)(a), it may file the petition in the circuit court for Dane County.

**History:** 1993 a. 479; 1995 a. 77, 225; 1997 a. 27, 205, 283; 1999 a. 9; 2003 a. 187.

A ch. 980 commitment is not an extension of a commitment under ch. 975, and s. 975.12 does not limit the state's ability to seek a separate commitment under ch. 980 of a person originally committed under ch. 975. State v. Post, 197 Wis. 2d 279, 541 N.W.2d 115 (1995).

For purposes of determining the proper time to file a ch. 980 petition under sub. (2)(ag), a sentence imposed for

a sexually violent offense includes a sentence imposed consecutively to any sentence for a sexually violent offense. State v. Keith, 216 Wis. 2d 61, 573 N.W.2d 888 (Ct. App. 1997).

As used in this chapter, "substantial probability" and "substantially probable" both mean much more likely than not. This standard for dangerousness does not violate equal protection nor is the term unconstitutionally vague. State v. Curiel, 227 Wis. 2d 389, 597 N.W.2d 697 (1999).

In deciding whether there is a substantial probability that the subject will commit future acts of sexual violence, the trier of fact is free to weigh expert testimony that conflicts and decide which is more reliable, to accept or reject an expert's testimony, including accepting only parts of the testimony, and to consider all non-expert testimony. State v. Kienitz, 227 Wis. 2d 423, 597 N.W.2d 712 (1999).

To the extent that s. 938.35(1) prohibits the admission of delinquency adjudications in ch. 980 proceedings, it is repealed by implication. State v. Matthew A.B. 231 Wis. 2d 688, 605 N.W.2d 598 (Ct. App. 1999).

In a trial on a petition filed under sub. (2), the state has the burden to prove beyond a reasonable doubt that the petition was filed within 90 days of the subject's release or discharge based on a sexually violent offense. State v. Thiel, 2000 WI 67, 235 Wis. 2d 823, 612 N.W.2d 94. See also State v. Thiel, 2001 WI App 52, 241 Wis. 2d 439, 625 N.W.2d 321.

While a commitment under ch. 980 is civil, a court does not lose subject matter jurisdiction because a petition is filed under a criminal case number. State v. Pharm, 2000 WI App 167, 238 Wis. 2d 97, 617 N.W.2d 163.

The mandatory release date is not excluded in determining whether under sub. (2)(ag) a petition is filed within "90 days of discharge or release." State v. Pharm, 2000 WI App 167, 238 Wis. 2d 97, 617 N.W.2d 163.

The time limit in sub. (2)(ag) is mandatory. There is no authority for the state to hold a person beyond the discharge date of a criminal sentence in order to file a ch. 980 petition. State v. Thomas, 2000 WI App 162, 238 Wis. 2d 216, 617 N.W.2d 230.

Although sub. (2)(ag) refers to the current juvenile code, ch. 938, and makes no reference to the 1993-94 juvenile code, ch. 48, the circuit court has authority to proceed under ch. 980 against a person adjudicated delinquent under the former ch. 48. State v. Gibbs, 2001 WI App 83, 242 Wis. 2d 640, 625 N.W.2d 666.

*Keith* is inapplicable to juveniles. The concept of consecutive sentences is foreign in the context of juvenile adjudications and dispositions. It was proper under sub. (2)(ag) to file a ch. 980 petition two days prior to the defendant's discharge from the sexual offense disposition although the defendant was subject to another adjudication that did not expire. State v. Wolfe, 2001 WI App 136, 246 Wis. 2d 233, 631 N.W.2d 240.

Chapter 980 provides its own procedures for commencing actions, and, as such, chs. 801 and 802 are inapplicable to the commencement of ch. 980 actions. State v. Wolfe, 2001 WI App 136, 246 Wis. 2d 233, 631 N.W.2d 240.

When a ch. 980 petition was filed within 90 days of release from a sentence for an offense that was not a sexually violent offense, which was being served concurrently with a

shorter sentence imposed for a sexually violent offense, the petition was timely. State v. Treadway, 2002 WI App 195, 257 Wis. 2d. 467, 651 N.W.2d 334.

The state was not precluded from seeking a ch. 980 commitment following the defendant's parole revocation, even though the state had failed to prove that the defendant was a sexually violent person in need of commitment in a previous ch. 980 trial that took place prior to the defendant's parole. State v. Parrish, 2002 WI App 263, 258 Wis. 2d 521, 654 N.W.2d 273.

Under sub. (2)(ag), the petition must be filed within 90 days of the actual discharge from prison. A subsequent sentence modification to allow sentence credit has no effect if the state filed the petition within 90 days of the actual release from prison. State v. Virlee, 2003 WI App 4, 259 Wis. 2d 718, 657 N.W.2d 106.

The circuit court had jurisdiction to conduct ch. 980 proceedings involving an enrolled tribal member who committed the underlying sexual offense on an Indian reservation. State v. Burgess, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124. 00-3074

Under sub. (1), a request from the agency with jurisdiction and a subsequent decision by the department of justice not to file are prerequisites to a district attorney's authority to file a ch. 980 petition. State v. Byers, 2003 WI 86, 263 Wis. 2d 113, 665 N.W.2d 729.

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**980.03 Rights of persons subject to petition.** (1) The circuit court in which a petition under s. 980.02 is filed shall conduct all hearings under this chapter. The court shall give the person who is the subject of the petition

reasonable notice of the time and place of each such hearing. The court may designate additional persons to receive these notices.

(2) Except as provided in ss. 980.09(2)(a) and 980.10 and without limitation by enumeration, at any hearing under this chapter, the person who is the subject of the petition has the right to:

(a) Counsel. If the person claims or appears to be indigent, the court shall refer the person to the authority for indigency determinations under s. 977.07(1) and, if applicable, the appointment of counsel.

(b) Remain silent.

(c) Present and cross-examine witnesses.

(d) Have the hearing recorded by a court reporter.

(3) The person who is the subject of the petition, the person's attorney, the department of justice or the district attorney may request that a trial under s. 980.05 be to a jury of 12. A request for a jury trial shall be made as provided under s. 980.05. Notwithstanding s. 980.05(2), if the person, the person's attorney, the department of justice or the district attorney does not request a jury trial, the court may on its own motion require that the trial be to a jury of 12. A verdict of a jury under this chapter is not valid unless it is unanimous.

(4) Whenever a person who is the subject of a petition filed under s. 980.02 or who has been committed under s. 980.06 is required to submit to an examination under this chapter, he or she may retain experts or professional persons to perform an examination. If the person retains a qualified expert or professional person of his or

her own choice to conduct an examination, the examiner shall have reasonable access to the person for the purpose of the examination, as well as to the person's past and present treatment records, as defined in s. 51.30(1)(b), and patient health care records as provided under s. 146.82(2)(c). If the person is indigent, the court shall, upon the person's request, appoint a qualified and available expert or professional person to perform an examination and participate in the trial or other proceeding on the person's behalf. Upon the order of the circuit court, the county shall pay, as part of the costs of the action, the costs of an expert or professional person appointed by a court under this subsection to perform an examination and participate in the trial or other proceeding on behalf of an indigent person. An expert or professional person appointed to assist an indigent person who is subject to a petition may not be subject to any order by the court for the sequestration of witnesses at any proceeding under this chapter.

**(5)** Upon a showing by the proponent of good cause under s. 807.13(2)(c), testimony may be received into the record of a hearing under this section by telephone or live audiovisual means.

**History:** 1993 a. 479; 1997 a. 252; 1999 a. 9.

There are circumstances when comment on the defendant's silence is permitted.

If a defendant refuses to be interviewed by the state's psychologist and the defense attorney challenges the psychologist's findings based on the lack of an interview, it is appropriate for the psychologist to testify about the refusal. State v. Adams, 223 Wis. 2d 60, 588 N.W.2d 336 (Ct. App. 1998).

If all jurors agree that the defendant suffers from a mental disease, unanimity requirements are met even if the jurors disagree on the disease that predisposes the defendant to reoffend. State v. Pletz, 2000 WI App 221, 239 Wis. 2d 49, 619 N.W.2d 97.

Chapter 980 provides its own procedures for commencing actions, and, as such, chs. 801 and 802 are inapplicable to the commencement of ch. 980 actions. State v. Wolfe, 2001 WI App 136, 246 Wis. 2d 233, 631 N.W.2d 240.

As sub. (3) provides that the court shall appoint a professional to furnish a written report providing guidance for the court's consideration of the ultimate issue, it would be absurd to conclude that admissibility was not provided under s. 908.02. That the report was not timely filed with the court did not render it inadmissible hearsay. State v. Brown, 2004 WI App. 33, 269 Wis. 2d 750, 676 N.W.2d 555, 03-1419.

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**980.04 Detention; probable cause hearing; transfer for examination.** (1) Upon the filing of a petition under s. 980.02, the court shall review the petition to determine whether to issue an order for detention of the person who is the subject of the petition. The person shall be detained only if there is cause to believe that the person is eligible for commitment under s. 980.05(5). A person detained under this subsection shall be held in a facility approved by the department. If the person is serving a sentence of imprisonment, is in a secured correctional facility, as defined in s. 938.02(15m), a secured child caring institution, as defined in s. 938.02(15g), or a secured group home, as defined in s. 938.02(15p), or is committed to institutional

care, and the court orders detention under this subsection, the court shall order that the person be transferred to a detention facility approved by the department. A detention order under this subsection remains in effect until the person is discharged after a trial under s. 980.05 or until the effective date of a commitment order under s. 980.06, whichever is applicable.

(2) Whenever a petition is filed under s. 980.02, the court shall hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person. If the person named in the petition is in custody, the court shall hold the probable cause hearing within 72 hours after the petition is filed, excluding Saturdays, Sundays and legal holidays. If the person named in the petition is not in custody, the court shall hold the probable cause hearing within a reasonable time after the filing of the petition.

(3) If the court determines after a hearing that there is probable cause to believe that the person named in the petition is a sexually violent person, the court shall order that the person be taken into custody if he or she is not in custody and shall order the person to be transferred within a reasonable time to an appropriate facility for an evaluation as to whether the person is a sexually violent person. If the court determines that probable cause does not exist to believe that the person is a sexually violent person, the court shall dismiss the petition.

(4) The department shall promulgate rules that provide the qualifications for persons conducting evaluations under sub. (3).

(5) If the person named in the petition claims or appears to be indigent, the court shall, prior to the probable

cause hearing under sub. (2), refer the person to the authority for indigency determinations under s. 977.07(1) and, if applicable, the appointment of counsel.

**History:** 1993 a. 479; 1995 a. 77; 1999 a. 9.

**Cross Reference:** See also ch. HFS 99, Wis. adm. code.

The rules of evidence apply to probable cause hearings under ch. 980. The exceptions to the rules for preliminary examinations also apply. Although s. 907.03 allows an expert to base an opinion on hearsay, an expert's opinion based solely on hearsay cannot constitute probable cause. State v. Watson, 227 Wis. 2d 167, 595 N.W.2d 403 (1999).

In sub. (2), "in custody" means in custody pursuant to ch. 980 and does not apply to custody under a previously imposed sentence. State v. Brissette, 230 Wis. 2d 82, 601 N.W.2d 678 (Ct. App. 1999).

Chapter 980 provides its own procedures for commencing actions, and, as such, chs. 801 and 802 are inapplicable to the commencement of ch. 980 actions. State v. Wolfe, 2001 WI App 136, 246 Wis. 2d 233, 631 N.W.2d 240.

The 72-hour time limit in sub. (2) is directory rather than mandatory. However, the individual's due process rights prevent the state from indefinitely delaying the probable cause hearing when the subject of the petition is in custody awaiting the hearing and has made a request for judicial substitution. State v. Beyer, 2001 WI App 184, 247 Wis. 2d 13, 632 N.W.2d 872.

Sub. (3) is not a rule regarding the admissibility of expert testimony. It provides the procedure for determining

probable cause to believe a person is a sexually violent offender. The general rule for determining the qualification of an expert applies. State v. Sprosty, 2001 WI App 231, 248 Wis. 2d 480, 636 N.W.2d 213.

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**980.05 Trial.** (1) A trial to determine whether the person who is the subject of a petition under s. 980.02 is a sexually violent person shall commence no later than 45 days after the date of the probable cause hearing under s. 980.04. The court may grant a continuance of the trial date for good cause upon its own motion, the motion of any party or the stipulation of the parties.

(1m) At the trial to determine whether the person who is the subject of a petition under s. 980.02 is a sexually violent person, all rules of evidence in criminal actions apply. All constitutional rights available to a defendant in a criminal proceeding are available to the person.

(2) The person who is the subject of the petition, the person's attorney, the department of justice or the district attorney may request that a trial under this section be to a jury of 12. A request for a jury trial under this subsection shall be made within 10 days after the probable cause hearing under s. 980.04. If no request is made, the trial shall be to the court. The person, the person's attorney or the district attorney or department of justice, whichever is applicable, may withdraw his, her or its request for a jury trial if the 2 persons who did not make the request consent to the withdrawal.

(3)(a) At a trial on a petition under this chapter, the petitioner has the burden of proving the allegations in the petition beyond a reasonable doubt.

(b) If the state alleges that the sexually violent offense or act that forms the basis for the petition was an act that was sexually motivated as provided in s. 980.01(6)(b), the state is required to prove beyond a reasonable doubt that the alleged sexually violent act was sexually motivated.

(4) Evidence that the person who is the subject of a petition under s. 980.02 was convicted for or committed sexually violent offenses before committing the offense or act on which the petition is based is not sufficient to establish beyond a reasonable doubt that the person has a mental disorder.

(5) If the court or jury determines that the person who is the subject of a petition under s. 980.02 is a sexually violent person, the court shall enter a judgment on that finding and shall commit the person as provided under s. 980.06. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent person, the court shall dismiss the petition and direct that the person be released unless he or she is under some other lawful restriction.

**History:** 1993 a. 479; 1999 a. 9.

Sub. (1m) extends the rule protecting prearrest silence under the right against self-incrimination to the refusal of a commitment subject to participate in a formal evaluation prior to the filing of the commitment petition. State v. Zanelli, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997).

Sub. (1m) does not require a sworn petition. There is no constitutional right to a sworn complaint in a criminal case. State v. Zanelli, 212 Wis. 2d 358, 569 N.W.2d 301 (Ct. App. 1997).

This section does not confine expert testimony to any specific standard nor mandate the type or character of relevant evidence that the state may choose to meet its burden of proof. State v. Zanelli, 223 Wis. 2d 545, 589 N.W.2d 687 (Ct. App. 1998).

The standard of review for commitments under ch. 980 is the standard applicable to the review of criminal cases – whether the evidence could have led the trier of fact to find beyond a reasonable doubt that the person subject to commitment is a sexually violent person. State v. Curiel, 227 Wis. 2d 389, 597 N.W.2d 697 (1999).

Sub. (1m) provides a respondent with a statutory right to be competent at trial. The procedure to effect that right should adhere to ss. 971.13 and 971.14. State v. Smith, 229 Wis. 2d 720, 600 N.W.2d 258 (Ct. App. 1999).

The right to a jury trial under ch. 980 is governed by sub. (2) rather than case law governing the right to a jury trial in criminal proceedings. State v. Bernstein, 231 Wis. 2d 392, 605 N.W.2d 555 (1999).

The sub. (2) requirement that the 2 persons who did not request the withdrawal of a request for a jury trial consent to the withdrawal does not require a personal statement from the person subject to the commitment proceeding. Consent may be granted by defense counsel. State v. Bernstein, 231 Wis. 2d 392, 605 N.W.2d 555 (1999).

To the extent that s. 938.35 (1) prohibits the admission of delinquency adjudications in ch. 980 proceedings, it is repealed by implication. State v. Matthew A.B. 231 Wis. 2d 688, 605 N.W.2d 598 (Ct. App. 1999).

Sub. (2) does not require that a respondent be advised by the court that a jury verdict must be unanimous in

order for the withdrawal of a request for a jury trial to be valid. State v. Denman, 2001 WI App 96, 243 Wis. 2d 14, 626 N.W.2d 296.

Chapter 980 respondents are afforded the same constitutional protections as criminal defendants. Although the doctrine of issue preclusion may generally apply in ch. 980 cases, application of the doctrine may be fundamentally unfair. When new evidence of victim recantation was offered at the ch. 980 trial, the defendant had a due process interest in gaining admission of the evidence to ensure accurate expert opinions on his mental disorder and future dangerousness when the experts' opinions presented were based heavily on the fact that the defendants committed the underlying crime. State v. Sorenson, 2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354.

A sexually violent person committed under ch. 980 preserves the right to appeal, as a matter of right, by filing postverdict motions within 20 days of the commitment order. State v. Treadway, 2002 WI App 195, 257 Wis. 2d. 467, 651 N.W.2d 334.

A parole and probation agent who had been employed full-time in a specialized sex-offender unit for 3 years during which he had supervised hundreds of sex offenders was prepared by both training and experience to assess a sex offender, and was qualified to render an opinion on whether he would reoffend. That the agent did not provide the nexus to any mental disorder did not render his testimony inadmissible. State v. Treadway, 2002 WI App 195, 257 Wis. 2d. 467, 651 N.W.2d 334.

Neither ch. 980 nor ch. 51 grants persons being committed under ch. 980 the right to request confidential proceedings. That ch. 51 hearings are closed while ch. 980

hearings are not does not violate equal protection. State v. Burgess, 2002 WI App 264, 258 Wis. 2d 548, 654 N.W.2d 81. Affirmed. 2003 WI 71, 262 WI 2d 354, 665 NW2d 124.

Article I, section 7 does not prohibit the legislature from enacting statutes requiring that trials be held in certain counties. The legislature could properly provide in sub. (2) that ch. 980 proceedings be held in a county other than the one in which the predicate offense was committed. State v. Tainter, 2002 WI App 296, 259 Wis. 2d 387, 655 N.W.2d 538.

During a commitment proceeding under ch. 980, s. 904.04 (2), relating to other crimes evidence, does not apply to evidence offered to prove that the respondent has a mental disorder that makes it substantially probable that the respondent will commit acts of sexual violence in the future. State v. Franklin, 2004 WI 38, 270 Wis. 2d 271, 677 N.W.2d 276, 00-2426.

No error was found in giving a jury a general verdict form in a ch. 980 hearing when the defendant failed to establish that ch. 980 respondents are routinely deprived of special verdicts and that general verdicts are more likely to result in commitments. State v. Madison, 2004 WI App 46, 271 Wis. 2d 218, 678 N.W.2d 607, 02-3099.

A prisoner was not entitled to *Miranda* warnings prior to his pre-petition evaluation with the state's psychologist in regard to whether a ch. 980 petition should be filed. The guaranty of constitutional rights under sub. (1m) applies at the ch. 980 trial. State v. Lombard, 2004 WI 95, ___ Wis. 2d ___, 684 N.W.2d 103, 00-3318.

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**980.06 Commitment.** If a court or jury determines that the person who is the subject of a petition under s. 980.02 is a sexually violent person, the court shall order the person to be committed to the custody of the department for control, care and treatment until such time as the person is no longer a sexually violent person. A commitment order under this section shall specify that the person be placed in institutional care.

**History:** 1993 a. 479; 1995 a. 276; 1997 a. 27, 275, 284; 1999 a. 9.

In the event that there is a failure to develop an appropriate treatment program, the remedy is to obtain appropriate treatment and not supervised release. State v. Seibert, 220 Wis. 2d 308, 582 N.W.2d 745 (Ct. App. 1998).

Chapter 980 and s. 51.61 provide the statutory basis for a court to issue an involuntary medication order for individuals who suffer from a chronic mental illness and are committed under ch. 980. State v. Anthony D.B. 2000 WI 94, 237 Wis. 2d 1, 614 N.W.2d 435.

The incremental infringement by s. 980.06 on the liberty interests of those who have a sexually-violent, predatory past and are currently suffering from a mental disorder that makes them dangerous sexual predators does not violate constitutional guarantees of due process. State v. Ransdell, 2001 WI App 202, 247 Wis. 2d 613, 634 N.W.2d 871.

Although ch. 51 is more "lenient" with those who are subject to its provisions than is ch. 980, the significant differences between the degree of danger posed by each of the two classes of persons subject to commitment under the two chapters, as well as the differences in what must

be proven in order to commit under each, does not result in a violation of equal protection. State v. Williams, 2001 WI App 263, 249 Wis. 2d 1, 637 N.W.2d 791.

Chapter 980, as amended, is not a punitive criminal statute. Because whether a statute is punitive is a threshold question for both double jeopardy and ex post facto analysis, neither of those clauses is violated by ch. 980. State v. Rachel, 2002 WI 81, 254 Wis. 2d 215, 646 N.W.2d 375.

The mere limitation of a committed person's access to supervised release does not impose a restraint to the point that it violates due process. As amended, ch. 980 serves the legitimate and compelling state interests of providing treatment to, and protecting the public from, the dangerously mentally ill. The statute is narrowly tailored to meet those interests, and, as such, it does not violate substantive due process. State v. Rachel, 2002 WI 81, 254 Wis. 2d 215, 646 N.W.2d 375.

Commitment under ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for the person in controlling his or her behavior. Proof that the person's mental disorder predisposes the individual to engage in acts of sexual violence and establishes a substantial probability that the person will again commit those acts necessarily and implicitly includes proof that the person's mental disorder involves serious difficulty in controlling his or her behavior. State v. Laxton, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784.

Chapter 980 does not preclude finding that a person with a sexually-related mental disorder has difficulty in controlling his or her behavior even if that person is able

to conform his conduct to the requirements of the law. State v. Burgess, 2002 WI App 264, 258 Wis. 2d 548, 654 N.W.2d 81, 00-3074. Affirmed. 2003 WI 71, 262 WI 2d 354, 665 NW2d 354.

To the extent that plaintiffs are uncontrollably violent and pose a danger to others, the state is entitled to hold them in segregation for that reason alone. Preserving the safety of the staff and other detainees takes precedence over medical goals. West v. Schwebke, 333 F.3d 745 (2003).

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**980.063 Deoxyribonucleic acid analysis requirements.** (1)(a) If a person is found to be a sexually violent person under this chapter, the court shall require the person to provide a biological specimen to the state crime laboratories for deoxyribonucleic acid analysis.

(b) The results from deoxyribonucleic acid analysis of a specimen under par. (a) may be used only as authorized under s. 165.77(3). The state crime laboratories shall destroy any such specimen in accordance with s. 165.77(3).

(2) The department of justice shall promulgate rules providing for procedures for defendants to provide specimens under sub. (1) and for the transportation of those specimens to the state crime laboratories for analysis under s. 165.77.

**History:** 1995 a. 440.

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**980.065 Institutional care for sexually violent persons.** (1m) The department shall place a person committed under s. 980.06 at the secure mental health facility

established under s. 46.055, the Wisconsin resource center established under s. 46.056 or a secure mental health unit or facility provided by the department of corrections under sub. (2).

**(1r)** Notwithstanding sub. (1m), the department may place a female person committed under s. 980.06 at Mendota Mental Health Institute, Winnebago Mental Health Institute, or a privately operated residential facility under contract with the department of health and family services.

**(2)** The department may contract with the department of corrections for the provision of a secure mental health unit or facility for persons committed under s. 980.06. The department shall operate a secure mental health unit or facility provided by the department of corrections under this subsection and shall promulgate rules governing the custody and discipline of persons placed by the department in the secure mental health unit or facility provided by the department of corrections under this subsection.

**History:** 1993 a. 479; 1997 a. 27; 1999 a. 9; 2001 a. 16.

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**980.067 Activities off grounds.** The superintendent of the facility at which a person is placed under s. 980.065 may allow the person to leave the grounds of the facility under escort. The department of health and family services shall promulgate rules for the administration of this section.

**History:** 2001 a. 16.

**Cross Reference:** See also s. HFS 95.10, Wis. adm. code.

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**980.07 Periodic reexamination; report.** (1) If a person has been committed under s. 980.06 and has not been discharged under s. 980.09, the department shall conduct an examination of his or her mental condition within 6 months after an initial commitment under s. 980.06 and again thereafter at least once each 12 months for the purpose of determining whether the person has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged. At the time of a reexamination under this section, the person who has been committed may retain or seek to have the court appoint an examiner as provided under s. 980.03(4).

(2) Any examiner conducting an examination under this section shall prepare a written report of the examination no later than 30 days after the date of the examination. The examiner shall place a copy of the report in the person's medical records and shall provide a copy of the report to the court that committed the person under s. 980.06.

(3) Notwithstanding sub. (1), the court that committed a person under s. 980.06 may order a reexamination of the person at any time during the period in which the person is subject to the commitment order.

**History:** 1993 a. 479; 1999 a. 9.

The 6-month period under sub. (1) for the 1st reexamination does not begin to run until the court conducts the dispositional hearing and issues an initial commitment

order under s. 980.06 (2). State v. Marberry, 231 Wis. 2d 581, 605 N.W.2d 512 (Ct. App. 1999).

As part of an annual review, an involuntary medication order must be reviewed following the same procedure used to obtain the initial order. State v. Anthony D.B. 2000 WI 94, 237 Wis. 2d 1, 614 N.W.2d 435.

It is within the committed person's discretion to ask for an independent examination. The trial court does not have discretion to refuse the request. State v. Thiel, 2001 WI App 32, 241 Wis. 2d 465, 626 N.W.2d 26.

The 6-month time period in sub. (1) for an initial reexamination is mandatory. State ex rel. Marberry v. Macht, 2003 WI 79, 262 Wis. 2d 720, 665 N.W.2d 155.

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**980.08 Petition for supervised release.** (1) Any person who is committed under s. 980.06 may petition the committing court to modify its order by authorizing supervised release if at least 18 months have elapsed since the initial commitment order was entered or at least 6 months have elapsed since the most recent release petition was denied or the most recent order for supervised release was revoked. The director of the facility at which the person is placed may file a petition under this subsection on the person's behalf at any time.

(2) If the person files a timely petition without counsel, the court shall serve a copy of the petition on the district attorney or department of justice, whichever is applicable and, subject to s. 980.03(2)(a), refer the matter to the authority for indigency determinations under s. 977.07(1) and appointment of counsel under s. 977.05 (4)(j). If the person petitions through counsel, his or her

attorney shall serve the district attorney or department of justice, whichever is applicable.

(3) Within 20 days after receipt of the petition, the court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate, who shall examine the person and furnish a written report of the examination to the court within 30 days after appointment. The examiners shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records, as defined in s. 51.30(1)(b), and patient health care records, as provided under s. 146.82(2)(c). If any such examiner believes that the person is appropriate for supervised release under the criteria specified in sub. (4)(b), the examiner shall report on the type of treatment and services that the person may need while in the community on supervised release. The county shall pay the costs of an examiner appointed under this subsection as provided under s. 51.20(18)(a).

(4)(a) The court, without a jury, shall hear the petition within 30 days after the report of the court-appointed examiner is filed with the court, unless the petitioner waives this time limit. Expenses of proceedings under this subsection shall be paid as provided under s. 51.20(18)(b), (c), and (d).

(b) The court shall grant the petition unless the state proves by clear and convincing evidence one of the following:

1. That it is still likely that the person will engage in acts of sexual violence if the person is not continued in institutional care.

2. That the person has not demonstrated significant progress in his or her treatment or the person has refused treatment.

(c) In making a decision under par. (b), the court may consider, without limitation because of enumeration, the nature and circumstances of the behavior that was the basis of the allegation in the petition under s. 980.02(2)(a), the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment, including pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen if the person is a serious child sex offender. A decision under par. (b) on a petition filed by a person who is a serious child sex offender may not be made based on the fact that the person is a proper subject for pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen or on the fact that the person is willing to participate in pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen.

(5) If the court finds that the person is appropriate for supervised release, the court shall notify the department. The department shall make its best effort to arrange for placement of the person in a residential facility or dwelling that is in the person's county of residence, as determined by the department under s. 980.105. The department and the county department under s. 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community. The plan shall address the person's need, if any, for supervision, counseling,

medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment. In developing a plan for where the person may reside while on supervised release, the department shall consider the proximity of any potential placement to the residence of other persons on supervised release and to the residence of persons who are in the custody of the department of corrections and regarding whom a sex offender notification bulletin has been issued to law enforcement agencies under s. 301.46(2m)(a) or (am). If the person is a serious child sex offender, the plan shall address the person's need for pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen. The department may contract with a county department, under s. 51.42(3)(aw) 1. d., with another public agency or with a private agency to provide the treatment and services identified in the plan. The plan shall specify who will be responsible for providing the treatment and services identified in the plan. The plan shall be presented to the court for its approval within 60 days after the court finding that the person is appropriate for supervised release, unless the department, county department and person to be released request additional time to develop the plan. If the county department of the person's county of residence declines to prepare a plan, the department may arrange for another county to prepare the plan if that county agrees to prepare the plan and if the person will be living in that county. If the department is unable to arrange for another county to prepare a plan, the court shall designate a county department to prepare the plan, order the county department to prepare the plan and place the person on supervised release in that county, except that the court may not so designate the county department in any county where there is a facility in

which persons committed to institutional care under this chapter are placed unless that county is also the person's county of residence.

**(6m)** An order for supervised release places the person in the custody and control of the department. The department shall arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the plan for supervised release approved by the court under sub. (5). A person on supervised release is subject to the conditions set by the court and to the rules of the department. Before a person is placed on supervised release by the court under this section, the court shall so notify the municipal police department and county sheriff for the municipality and county in which the person will be residing. The notification requirement under this subsection does not apply if a municipal police department or county sheriff submits to the court a written statement waiving the right to be notified. If the department alleges that a released person has violated any condition or rule, or that the safety of others requires that supervised release be revoked, he or she may be taken into custody under the rules of the department. The department shall submit a statement showing probable cause of the detention and a petition to revoke the order for supervised release to the committing court and the regional office of the state public defender responsible for handling cases in the county where the committing court is located within 72 hours after the detention, excluding Saturdays, Sundays and legal holidays. The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person. Pending the revocation hearing, the department may detain the person in a jail or

in a hospital, center or facility specified by s. 51.15(2). The state has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of others requires that supervised release be revoked. If the court determines after hearing that any rule or condition of release has been violated, or that the safety of others requires that supervised release be revoked, it may revoke the order for supervised release and order that the released person be placed in an appropriate institution until the person is discharged from the commitment under s. 980.09 or until again placed on supervised release under this section.

**History:** 1993 a. 479; 1995 a. 276; 1997 a. 27, 275, 284; 1999 a. 9 ss. 3223L, 3232p to 3238d; 1999 a. 32; 2001 a. 16; 2003 a. 187.

**Cross Reference:** See also ch. HFS 98, Wis. adm. code.

Sub. (6m) [formerly s. 980.06(2)(d)] requires post-hearing notice to the local law enforcement agencies. In re Commitment of Goodson, 199 Wis. 2d 426, 544 N.W.2d 611 (Ct. App. 1996).

Whether in a proceeding for an initial ch. 980 commitment or a later petition for supervised release, there is no requirement that the state prove the person is treatable. State v. Seibert, 220 Wis. 2d 308, 582 N.W.2d 745 (Ct. App. 1998).

There is no exception under sub. (5) for a court to refuse to order release after it determines under sub. (4) that release is appropriate. If treatment programs are unavailable, the court shall order a county, through DHFS, to prepare a plan and place the person on supervised

release in that county. The court may order the county to create whatever programs or facilities are necessary to accommodate the supervised release. State v. Sprosty, 227 Wis. 2d 316, 595 N.W.2d 692 (1999).

As used in this chapter, "substantial probability" and "substantially probable" both mean much more likely than not. This standard for dangerousness does not violate equal protection nor is the term unconstitutionally vague. State v. Curiel, 227 Wis. 2d 389, 597 N.W.2d 697 (1999).

An institutionalized sex offender who agreed to a stipulation providing supervised release, giving up his right to a jury trial on his discharge petition in exchange, had a constitutional right to enforcement of the agreement. State v. Krueger, 2001 WI App 76, 242 Wis. 2d 793, 626 N.W.2d 83.

An indigent sexually violent person is constitutionally entitled to assistance of counsel in bringing a first appeal as of right from a denial of his or her petition for supervised release. State ex rel. Seibert v. Macht, 2001 WI 67, 244 Wis. 2d 378, 627 N.W.2d 881.

A person subject to a proceeding to revoke supervised release is entitled to the same due process protections as afforded persons in probation and parole revocation proceedings. Notice of the grounds that are the basis for the revocation must be given. A court can only base a revocation on the grounds of public safety under sub. (6m) when notice has been properly given. State v. VanBronkhorst, 2001 WI App 190, 247 Wis. 2d 247, 633 N.W.2d 236.

A sexual assault need not occur and the person's behavior need not be criminal before the court can conclude that there is a substantial probability that a person

will reoffend if institutional care is not continued. The relevant inquiry under sub. (4) is whether the behavior indicates a likelihood to reoffend. State v. Sprosty, 2001 WI App 231, 248 Wis. 2d 480, 636 N.W.2d 213.

A trial court's decision whether to grant a request for conditional release is subject to a discretionary standard of review of whether the trial court properly exercised its discretion in making its decision. State v. Wenk, 2001 WI App. 268, 248 Wis. 2d 714, 637 N.W.2d 417.

Sub. (6m), not s. 806.07(1)(h), governs granting relief to the state from a ch. 980 committee's supervised release when the committee is confined in an institution awaiting placement on supervised release. Sub. (6m) provides no procedure for initiating revocation other than by the department of health and family services action, preventing courts or prosecutors from initiating revocations. State v. Morford, 2004 WI 5, 268 Wis. 2d 300, 674 N.W.2d 349, 01-2461.

Ch. 980 was not unconstitutionally applied to the defendant when an order for supervised release could not be carried out due to an inability to find an appropriate placement and the defendant remained in custody. Any judicial decision that puts the community at risk because of what agents of government may have done or not done must balance the potential injury to society's interests against the potential benefits that would flow from any rule designed to deter future conduct by those agents. State v. Schulpius, 2004 WI App 39, 270 Wis. 2d 427, 678 N.W.2d 369, 02-1056.

A rule regulating the conduct of a sexually violent person on supervised release satisfies the procedural due process requirement of adequate notice if it is sufficiently

precise for the probationer to know what conduct is required or prohibited. State v. Burris, 2004 WI 91, ___ Wis. 2d ___, 682 N.W.2d 812, 00-1425.

Under sub. (6m) [formerly s. 980.06(2)(d)], a circuit court must determine whether any rule or condition of release has been violated or whether the safety of others requires revocation. A circuit court is not required to expressly consider alternatives to revocation before revoking a sexually violent person's supervised release when the court determines that the safety of the public requires the person's commitment to a secure facility. State v. Burris, 2004 WI 91, ___ Wis. 2d ___, 682 N.W.2d 812, 00-1425.

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**980.09 Petition for discharge; procedure.** (1) PETITION WITH SECRETARY'S APPROVAL. (a) If the secretary determines at any time that a person committed under this chapter is no longer a sexually violent person, the secretary shall authorize the person to petition the committing court for discharge. The person shall file the petition with the court and serve a copy upon the department of justice or the district attorney's office that filed the petition under s. 980.02(1), whichever is applicable. The court, upon receipt of the petition for discharge, shall order a hearing to be held within 45 days after the date of receipt of the petition.

(b) At a hearing under this subsection, the district attorney or the department of justice, whichever filed the original petition, shall represent the state and shall have the right to have the petitioner examined by an expert or professional person of his, her or its choice. The hearing shall be before the court without a jury. The state has the burden of proving by clear and convincing evidence that the petitioner is still a sexually violent person.

(c) If the court is satisfied that the state has not met its burden of proof under par. (b), the petitioner shall be discharged from the custody or supervision of the department. If the court is satisfied that the state has met its burden of proof under par. (b), the court may proceed to determine, using the criteria specified in s. 980.08(4)(b), whether to modify the petitioner's existing commitment order by authorizing supervised release.

(2) PETITION WITHOUT SECRETARY'S APPROVAL. (a) A person may petition the committing court for discharge from custody or supervision without the secretary's approval. At the time of an examination under s. 980.07(1), the secretary shall provide the committed person with a written notice of the person's right to petition the court for discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall forward the notice and waiver form to the court with the report of the department's examination under s. 980.07. If the person does not affirmatively waive the right to petition, the court shall set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the person is still a sexually violent person. The committed person has a right to have an attorney represent him or her at the probable cause hearing, but the person is not entitled to be present at the probable cause hearing.

(b) If the court determines at the probable cause hearing under par. (a) that probable cause exists to believe that the committed person is no longer a sexually violent person, then the court shall set a hearing on the issue. At a hearing under this paragraph, the committed person is entitled to be present and to the benefit of the protections afforded to the person under s. 980.03. The district attorney or the department of justice, whichever filed the

original petition, shall represent the state at a hearing under this paragraph. The hearing under this paragraph shall be to the court. The state has the right to have the committed person evaluated by experts chosen by the state. At the hearing, the state has the burden of proving by clear and convincing evidence that the committed person is still a sexually violent person.

(c) If the court is satisfied that the state has not met its burden of proof under par. (b), the person shall be discharged from the custody or supervision of the department. If the court is satisfied that the state has met its burden of proof under par. (b), the court may proceed to determine, using the criteria specified in s. 980.08(4)(b), whether to modify the person's existing commitment order by authorizing supervised release.

**History:** 1993 a. 479; 1999 a. 9; 2003 a. 187.

Persons committed under ch. 980 must be afforded the right to request a jury for discharge hearings under this section. State v. Post, 197 Wis. 2d 279, 541 N.W.2d 115 (1995).

Sub. (2)(a) does not contemplate an evidentiary hearing as is provided under sub. (2)(b). Under sub. (2)(a), the hearing is a paper review of the reexamination reports that allows the committing court to weed out frivolous petitions. State v. Paulick, 213 Wis. 2d 432, 570 N.W.2d 626 (Ct. App. 1997).

The right to counsel under sub. (2)(a) is subject to the same standards and procedures for resolving right in counsel issues as in criminal cases. State v. Thiel, 2001 WI App 52, 241 Wis. 2d 465, 626 N.W.2d 26.

Sub. (2)(a) does not allow unlimited submission of evidence, but does allow the submission of a second medical examination report. State v. Thayer, 2001 WI App 51, 241 Wis. 2d 417, 626 N.W.2d 811.

Probable cause that a detainee is no longer a sexually violent person is not demonstrated by an expert's conclusion that the detainee has the ability to control his or her behavior. A court must not only consider whether the person has the ability to make choices, but the degree to which those choices are driven by a mental disorder. Pedophilia is a mental disorder that by definition includes a diagnosis of lack of control. State v. Schiller, 2003 WI App 195, 266 Wis. 2d 992, 669 N.W.2d 747, 02-2963.

Progress in treatment is one way of showing that a person is not still a sexually violent person under sub. (2)(a). A new diagnosis is another. A new diagnosis need not attack the original finding that an individual was sexually violent, but focuses on the present and is evidence of whether an individual is still a sexually violent person. State v. Pocan, 2003 WI App 233, 267 Wis. 2d 953, 671 N.W.2d 680, 02-3342.

The question at a sub. (2)(a) probable cause hearing is whether probable cause exists to establish that the individual seeking discharge is no longer a sexually violent person and is not whether the individual is substantially probable to engage in acts of sexual violence if placed on supervised release or even if discharged from commitment. Probable cause to believe a person is no longer a sexually violent person is not satisfied by a recommendation of supervised release without more. State v. Thiel, 2004 WI App 140, ___ Wis. 2d ___, ___ N.W.2d ___, 03-2098.

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**980.10 Additional discharge petitions.** In addition to the procedures under s. 980.09, a committed person may petition the committing court for discharge at any time, but if a person has previously filed a petition for discharge without the secretary's approval and the court determined, either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person was still a sexually violent person, then the court shall deny any subsequent petition under this section without a hearing unless the petition contains facts upon which a court could find that the condition of the person had so changed that a hearing was warranted. If the court finds that a hearing is warranted, the court shall set a probable cause hearing in accordance with s. 980.09(2)(a) and continue proceedings under s. 980.09(2)(b), if appropriate. If the person has not previously filed a petition for discharge without the secretary's approval, the court shall set a probable cause hearing in accordance with s. 980.09(2)(a) and continue proceedings under s. 980.09(2)(b), if appropriate.

**History:** 1993 a. 479.

Persons committed under ch. 980 must be afforded the right to request a jury for discharge hearings under this section. State v. Post, 197 Wis. 2d 279, 541 N.W.2d 115 (1995).

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**980.101 Reversal, vacation or setting aside of judgment relating to a sexually violent offense; effect. (1)** In this section, "judgment relating to a sexually violent offense" means a judgment of conviction for a sexually violent offense, an adjudication of delinquency on the basis of a sexually violent offense, or a judgment of not guilty of a sexually violent offense by reason of mental disease or defect.

(2) If, at any time after a person is committed under s. 980.06, a judgment relating to a sexually violent offense committed by the person is reversed, set aside, or vacated and that sexually violent offense was a basis for the allegation made in the petition under s. 980.02(2)(a), the person may bring a motion for postcommitment relief in the court that committed the person. The court shall proceed as follows on the motion for postcommitment relief:

(a) If the sexually violent offense was the sole basis for the allegation under s. 980.02(2)(a) and there are no other judgments relating to a sexually violent offense committed by the person, the court shall reverse, set aside, or vacate the judgment under s. 980.05(5) that the person is a sexually violent person, vacate the commitment order, and discharge the person from the custody or supervision of the department.

(b) If the sexually violent offense was the sole basis for the allegation under s. 980.02(2)(a) but there are other judgments relating to a sexually violent offense committed by the person that have not been reversed, set aside, or vacated, or if the sexually violent offense was not the sole basis for the allegation under s. 980.02(2)(a), the court shall determine whether to grant the person a new trial under s. 980.05 because the reversal, setting aside, or vacating of the judgment for the sexually violent offense would probably change the result of the trial.

(3) An appeal may be taken from an order entered under sub. (2) as from a final judgment.

**History:** 2001 a. 16.

**980.105 Determination of county of residence.** The department shall determine a person's county of residence for the purposes of this chapter by doing all of the following:

(1) The department shall consider residence as the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation and shall consider physical presence as prima facie evidence of intent to remain.

(2) The department shall apply the criteria for consideration of residence and physical presence under sub. (1) to the facts that existed on the date that the person committed the sexually violent offense that resulted in the sentence, placement or commitment that was in effect when the petition was filed under s. 980.02.

**History:** 1995 a. 276; 2001 a. 16.

A person's county of residence shall be determined based on the facts that existed on the date of the underlying offense. A court does not have jurisdiction merely because the defendant was in a Wisconsin prison at the time the petition was filed. State v. Burgess, 2002 WI App 264, 258 Wis. 2d 548, 654 N.W.2d 81, 00-3074. Affirmed on other grounds. 2003 WI 71, 262 WI 2d 354, 665 N.W.2d 124, 00-3074. Affirmed on other grounds, 2003 WI 71, 262 WI. 2d 354, 665 N.W.2d 124, 00-3074.

The circuit court had jurisdiction to conduct ch. 980 proceedings involving an enrolled tribal member who committed the underlying sexual offense on an Indian reservation. State v. Burgess, 2003 WI 71, 262 Wis. 2d 354, 665 N.W.2d 124, 00-3074.

**980.11 Notice concerning supervised release or discharge.** (1) In this section:

(a) "Act of sexual violence" means an act or attempted act that is a basis for an allegation made in a petition under s. 980.02(2)(a).

(b) "Member of the family" means spouse, child, sibling, parent or legal guardian.

(c) "Victim" means a person against whom an act of sexual violence has been committed.

(2) If the court places a person on supervised release under s. 980.08 or discharges a person under s. 980.09 or 980.10, the department shall do all of the following: (am) Make a reasonable attempt to notify whichever of the following persons is appropriate, if he or she can be found, in accordance with sub. (3):

1. The victim of the act of sexual violence.

2. An adult member of the victim's family, if the victim died as a result of the act of sexual violence.

3. The victim's parent or legal guardian, if the victim is younger than 18 years old.

(bm) Notify the department of corrections.

(3) The notice under sub. (2) shall inform the department of corrections and the person under sub. (2)(am) of the name of the person committed under this chapter and the date the person is placed on supervised release or discharged. The department shall send the notice, postmarked at least 7 days before the date the person committed under this chapter is placed on supervised release or

discharged, to the department of corrections and to the last-known address of the person under sub. (2)(am).

(4) The department shall design and prepare cards for persons specified in sub. (2)(am) to send to the department. The cards shall have space for these persons to provide their names and addresses, the name of the person committed under this chapter and any other information the department determines is necessary. The department shall provide the cards, without charge, to the department of justice and district attorneys. The department of justice and district attorneys shall provide the cards, without charge, to persons specified in sub. (2)(am). These persons may send completed cards to the department of health and family services. All records or portions of records of the department of health and family services that relate to mailing addresses of these persons are not subject to inspection or copying under s. 19.35(1), except as needed to comply with a request by the department of corrections under s. 301.46(3)(d).

**History:** 1993 a. 479; 1995 a. 27 s. 9126(19); 1995 a. 440; 1997 a. 181; 1999 a. 9.

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**980.12 Department duties; costs.** (1) Except as provided in ss. 980.03(4) and 980.08(3), the department shall pay from the appropriations under s. 20.435(2)(a) and (bm) for all costs relating to the evaluation, treatment and care of persons evaluated or committed under this chapter.

(2) By February 1, 2002, the department shall submit a report to the legislature under s. 13.172(2) concerning the extent to which pharmacological treatment using an antiandrogen or the chemical equivalent of an

antiandrogen has been required as a condition of supervised release under s. 980.06, 1997 stats., or s. 980.08 and the effectiveness of the treatment in the cases in which its use has been required.

**History:** 1993 a. 479; 1997 a. 284; 1999 a. 9.

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**980.13 Applicability.** This chapter applies to a sexually violent person regardless of whether the person engaged in acts of sexual violence before, on or after June 2, 1994.

**History:** 1993 a. 479.

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